BINA SATU SDN. BHD.

v.

TAN CONSTRUCTION

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. D3-31-86 OF 1987]
18 JULY 1987

COMPANY LAW: *Winding up - Section 218(1)(e) of the Companies Act 1965 - Whether Court had the power to restrain a party from petitioning the Court to wind up a company.*

CIVIL PROCEDURE: *Injunction - Interim interlocutory - Inherent jurisdiction - Section 23(2) Courts of Judicature Act 1964 - Sections 50, 54(b) Specific Relief Act 1950 (Revised 1974).*

Tan Construction had sent a Companies Act s. 218(2) notice to Bina Satu Sdn. Bhd. (Bina) demanding the payment of a sum of RM64,811.18 said to be owing from Bina to Tan Construction for work done. If the amount demanded was not paid within 21 days Bina will be deemed to be unable to pay its debts and the appropriate action would be taken to have Bina wound up.

Bina thereupon took out this originating summons seeking an injunction restraining Tan Construction from instituting proceeding to wind up Bina. When the originating motion came up for hearing in chambers *ex parte*, an interim interlocutory injunction was granted until further order of the Court.

When the originating summons was recalled, the defendant took up a preliminary point. He contended that the power of the Court to grant the injunction sought was not founded upon statute but on inherent jurisdiction which power had been excluded by statutory prohibition namely s. 54(b) of the Specific Relief Act 1950 (Revised 1974).

The question which arose from this case was whether the Court had the power to restrain a party from petitioning the Court to wind up a company.

Held: the objection taken as a preliminary point is overruled:
[1] Section 23(2) of the Courts of Judicature Act 1964 provides confirmation that the Court continues to enjoy its inherent powers which includes the power to restrain any abuse of its proceedings;

[2] Section 50 of the Specific Relief Act provides statutory confirmation of the inherent jurisdiction of the Court to grant preventive relief by means of injunction temporary or perpetual and s. 52 and s. 55 must be read to have reference to perpetual injunctions only.

[3] Section 54(b) of the Specific Relief Act has reference to an injunction imposed on the other Court and not in respect of an injunction imposed on the parties to the litigation or intended litigation and the injunction sought in this case is not to restrain the Court but to restrain Tan Construction, its servants and agents from filing a petition.

[Order accordingly.]

Cases referred to:
Re A Company [1894] 2 Ch 349
Cadiz Waterworks Co. v. Barnett LR 19 EQ 182
Tan Suan Choo v. Majlis Perbandaran, Pulau Pinang [1983] 1 MLJ 323
Cotton Corpn. in India v. United Industrial Bank [1983] AIR SC 1272

Legislation referred to:
Companies Act 1965, s. 218(2)
Courts of Judicature Act 1964, s. 23(2)
Specific Relief Act 1950, ss. 50, 52, 53, 54, (b), 55
Specific Relief Act 1963 [Ind], s. 41, (b)

For the plaintiff - Y.L. Tho; M/s. Y.L. Tho & Partners
For the defendants - G.K. Sri Ram with Muthu; M/s. Muthu & Co.

JUDGMENT

VC George J:

An important question that arose in this matter was whether the Court had the power to restrain a party from petitioning the Court to wind up a company.

Tan Construction had sent a Companies Act s. 218(2) notice to Bina Satu Sdn. Bhd. (Bina) demanding the payment of a sum of RM64,811.18 said to be owing from Bina to Tan Construction for work done. Tan Construction's solicitors made it clear in the notice that it was a s. 218(2) notice and pointed out therein that if the amount demanded was not paid within 21 days Bina will be deemed to be unable to pay its debts and that appropriate action would be taken to have Bina wound up.

Bina thereupon took out this originating summons seeking an injunction restraining Tan Construction from instituting proceedings to wind up Bina. The originating summons was supported by the affidavit of one Hee Kon Ying who claims to be a director of Bina. Hee says that Tan Construction's claim appeared to be in respect of work done by them at a housing estate at Chaah, Johore. Hee says that the job had been contracted out by Bina to one Pann Marketing Co. Sdn. Bhd. and that if Tan Construction had completed that job it was not on the instructions of Bina. There never had been any contractual relations or at all between Tan Construction and Bina and accordingly even if Tan Construction had done or completed the job, their claim for work done should be against those who had employed them and not against Bina. Hee went on to say that his company is involved in a number of on-going projects as contractors the subject matter of which runs into millions and at the time of affirmation of his affidavit substantial sums of money were due to Bina in respect of those contracts. Further according to Hee, Bina had substantial financial facilities granted to them by their bankers. Hee says that the reaction of the bankers to the presentation of a winding up petition itself could ruin Bina. He contends that the harm the company would suffer before the petition is heard and disposed of would be immeasurable. Hee contended that the company was and is perfectly capable of meeting its liabilities and went on to contend that the demand for payment was misconceived and the taking of winding up proceedings is an abuse of the process of Court in that Tan Construction was aware that their claim was disputed. It was contended that the petition was being presented in order to pressurise the company into making payments (which it is not liable to pay) to avoid the drastic effects of the commencement of winding up proceedings.

When the originating motion came up for hearing in chambers, *ex parte*, an interim interlocutory injunction was granted to obtain until further order of Court and directions were given for the originating summons to be heard *inter partes* on 26 May 1987.

Before that date various other affidavits were filed.

On 26 May 1987 when the originating summons was recalled, Encik G.K. Sri Ram of Counsel appeared with Encik Muthu on behalf of Tan Construction and asked for enclosure (7) which was the application to set aside the interim injunction to be heard. However, what I did was to hear the originating summons itself which is enclosure (1).

Encik Sri Ram then took up a preliminary point. His contention was that the power of the Court to grant the injunction sought was not founded upon statute but on inherent jurisdiction which power had been excluded by statutory prohibition namely s. 54(b) of the Specific Relief Act 1950 (Revised 1974).

Section 23(2) of the Courts of Judicature Act 1964 provides confirmation that the Court continues to enjoy its inherent powers. This includes the power to restrain any abuse of its proceedings. A classic illustration of the abuse of Court proceedings is provided in *Re A Company* [1984] 2 Ch 349 where it was held that where a petition against a company is presented ostensibly for a winding up order but in reality for another purpose such as to bring pressure to bear on the company, the Court has an inherent jurisdiction to prevent such an abuse of process and will do so by injunction. In *Cadiz Waterwork Co. v. Barnett* LR 19 EQ 182 it was for the same reason held that the creditor of a solvent company whose debt is *bona fide* disputed will be restricted from presenting a petition for winding up the company.

However, there could be no question but that by statute the inherent powers of the Court may be watered down or even be excluded. The question posed by the preliminary point taken is whether s. 54(b) has the effect of excluding or watering down the Court's inherent jurisdiction to grant an order restraining the abuse of its process.

Section 50 of the Specific Relief Act provides statutory confirmation of the inherent jurisdiction of the Court to grant preventive relief by means of injunction, temporary or perpetual. Sections 52 to 55 of the Act are found in the 10th chapter thereof which chapter is entitled "Perpetual Injunctions". On the face of it, those four ss. 52 to 55 must accordingly be read to have reference to perpetual injunctions only. Justice Edgar Joseph Jr. in *Tan Suan Choo v. Majlis Perbandaran, Pulau Pinang* [1983] 1 MLJ 323 applied such a limitation to the reading of those sections. Since the relief sought in the instant case is temporary and not perpetual although there appears to be some inconsistency between the title to the 10th chapter and the language of those four sections, I have not been able to see my way to refuse to read those sections without imposing the limitations suggested by the title to the chapter.

There is another and perhaps more forceful reason for holding that the preliminary objection has to fail. Our Specific Relief Act was inspired by the Indian Specific Relief Act of 1887 which is the predecessor to the current Indian Specific Relief Act 1963. The equipolent section to our s. 54(b) was their old s. 56(b) which section was in *pari materia* with our s. 54(b):

> An injunction cannot be granted:
>
> (a) ...
>
> (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought.

When the Indians amended their Specific Relief Act in 1963 the old s. 56(b) became the new s. 41(b) which is as follows:

> An injunction cannot be granted:
>
> (a) ...
>
> (b) to restrain any person from instituting or prosecuting any proceedings in a Court not subordinate to that from which the injunction is sought.

It seems to me that the difference between the old and the new is significant. In *Cotton Corpn. in India v. United Industrial Bank* AIR [1983] Supreme Court 1272 Mr. Justice Desai in discussing the old and new provisions said at p. 1275:

> A glance at the two provisions, the existing and the repealed, would reveal the legislative response to judicial interpretation. Under s. 56(b) of the repealed Act, the Court was precluded by its injunction to grant stay of proceeding in a Court not subordinate to that from which the injunction was sought. In other words, the Court could stay by its injunction a proceeding in a Court subordinate to the Court granting injunctions. The injunction granting stay of proceeding was directed to the Court and the Court has to be the Court subordinate to the one granting the injunction. This is postulated on the well recognised principle that the superior Court can regulate proceedings in a Court subordinate to it. It is implicit in this assumption and the language used in s. 56(b) that the Court could not grant injunction under s. 56(b) of the repealed Act to stay proceeding in a Court superior in hierarchy to the Court from which injunction is sought. But by judicial interpretation, a consensus was reached that as injunction acts *in personum* while the Court by its injunction cannot stay proceedings in a Court of superior jurisdiction, it could certainly by an injunction restrain a party before it from further prosecuting the proceeding in other Courts (which) may be superior or inferior in the hierarchy of Courts. To some extent this approach not only effectively circumvented the provision contained in s. 56 of the repealed Act but denuded it of its content. The legislature took notice of this judicial interpretation and materially altered the language of the suceeding provision enacted in s. 41(b) replacing s. 56(b) of the repealed Act while enacting Specific Relief Act of 1963.

For statutory encroachment into the inherent powers of the Court to be effective it must be by clear unambiguous language. It seems to me clear that both by inherent powers and by administrative rules the High Court may interfere with proceedings of the Subordinate Courts but it may not stay proceedings of a Court superior or even of co-ordinate jurisdiction to it. However, although with respect I do not agree with Mr. Justice Desai that the approach taken by the Indian Courts was to circumvent the section and to denude it of its content, I am inclined to follow him and the Indian judges who have commented on this issue in holding that their old s. 56(b) has reference to an injunction imposed on the other Court and not in respect of an injunction imposed on the parties to the litigation or intended litigation and would apply such an interpretation to our s. 54(b) which as has been seen is in *pari materia* with the old Indian s. 56(b). The judicial pronouncements on s. 41 of the Indian Specific Relief Act 1963 are of no relevance since there are no equipolent provisions in Malaysia.

Also found at [1988] 2 CLJ 652